IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CHRISTOPHER D. ZURCHER,

Petitioner,

v.

GUY HALL,

Respondent.

Civil No. 07-570-PK

FINDINGS AND RECOMMENDATION

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PAPAK, Magistrate Judge.

Petitioner, Christopher D. Zurcher, brings this habeas corpus action pursuant to 28 U.S.C. § 2254 and challenges his prison sentence for Attempted Aggravated Murder and First-Degree Kidnapping. For the reasons set forth below, the Amended Petition for Writ of Habeas Corpus (#16) should be denied, and judgment should be entered dismissing this action with prejudice.

BACKGROUND

In November 1999, Zurcher was indicted on charges of Attempted Aggravated Murder, First-Degree Kidnapping, and Second-Degree Kidnapping after taking an infant child and leaving him in a dumpster, intending that he die. On July 6, 2000, pursuant to a plea agreement, Zurcher pleaded guilty to Attempted Aggravated Murder and First-Degree Kidnapping, admitting that he "picked up the baby from his home and left him in a dumpster" and the state moved to dismiss the Second-Degree Kidnapping charge. The parties made no agreement with respect to sentencing.

Zurcher was sentenced on August 10, 2000, approximately six weeks after the United States Supreme Court issued its decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The sentencing court applied an upward departure to 240 months for Aggravated Murder and a presumptive sentence of 120 months for First-Degree Kidnapping, of which 90 months were to be served consecutively to the sentence for murder, for a total sentence of 330 months

imprisonment.

On January 3, 2001, Zurcher filed an Amended Petition for Post-Conviction Relief ("PCR"), asserting that his trial counsel was ineffective for failing to file a notice of appeal. The PCR court granted relief in the form of a delayed appeal. (#14 Ex. 116.) Zurcher filed a delayed Notice of Appeal, but then moved to dismiss the appeal before he filed an appellate brief. The Oregon Court of Appeals granted his motion and dismissed the appeal. (#14 Ex. 117.)

On, or about August 5, 2004, Zurcher filed a Second Amended Petition for Post-Conviction Relief, alleging several ineffective assistance of counsel claims, including failure to object to the upward departure at sentencing. (#14 Ex. 118.) The PCR court denied relief. (#14 Ex. 123.) The Oregon Court of Appeals affirmed without opinion, and the Oregon Supreme Court denied review. *Zurcher v. Hall*, 209 Or. App. 87, 149 P.3d 347 (2006), *review denied* 342 Or. 504, 155 P.3d 875 (2007).

On April 16, 2007, Zurcher filed an Amended Petition for Writ of Habeas Corpus in this Court (#16), raising the following ineffective assistance of trial counsel claims:

> (a) Counsel failed to recognize and raise an *Apprendi*-based objection to the trial court's imposition of a durational departure sentence on Count 1 [aggravated murder] - a sentence based not on facts plead in the indictment or admitted by the Defendant, but on facts found by the trial court at the time of sentencing;

(b) [C]ounsel failed to recognize and raise an *Apprendi*-based objection to the trial court's imposition of a consecutive sentence on Count 2 [Kidnaping] - a sentence based not on facts plead in the indictment or admitted by the Defendant, but on facts found by the trial court at the time of sentencing;

c) [C]ounsel failed to recognize and raise an *Apprendi*-based objection to the trial court's order providing that Mr. Zurcher is ineligible for any generally applicable release or leave programs with respect to Counts 1 and 2 - an order predicated on facts not admitted by the Defendant, but found by the trial court at the time of sentencing.

Zurcher argues the PCR trial court decision denying relief on these claims is contrary to and an unreasonable application of established federal law. Respondent contends claims (b) and (c) were not presented to any state court and are procedurally defaulted, and claim (a) is without merit.

DISCUSSION

I. Procedurally Defaulted Claims

Before a federal court may consider granting habeas corpus relief, a state prisoner must have exhausted all available state court remedies either on direct appeal or through collateral proceedings. *See* 28 U.S.C. § 2254 (b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999) (state courts must have an opportunity to act on claims before they are presented in a federal habeas petition). A state prisoner satisfies the exhaustion requirement by fairly presenting his claims to the appropriate state courts at all appellate stages afforded under

state law. *Baldwin v.* Reese, 541 U.S. 27, 29 (2004); *Casey v. Moore*, 386 F.3d 896, 915-16 (9th Cir. 2004); *Castillo v. McFadden*, 370 F.3d 882, 886 (9th Cir. 2004). A claim is fairly presented when it apprises the state court of the facts and legal theory upon which the claim is premised. *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005); *Weaver v. Thompson*, 197 F.3d 359, 364 (9th Cir. 1999). In Oregon, the Oregon Supreme Court is the highest state court with jurisdiction to hear post-conviction claims in satisfaction of the exhaustion requirement. *See* Or. Rev. Stat. § 138.650 (2005).

A state prisoner procedurally defaults federal claims if he fails to raise them as federal claims in state court or fails to present the merits because he did not comply with applicable state procedural rules. *O'Sullivan*, 526 U.S. at 848; *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The State can successfully assert a procedural default defense to federal habeas review unless the prisoner can show both "cause" for the procedural default and actual prejudice, or the prisoner demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice. *Edwards v. Carpenter,* 529 U.S. 446, 451 (2000); *Coleman*, 501 U.S. at 750; *Insyxiengmay*, 403 F.3d at 665.

A review of the record reveals that Zurcher did not present claims (b) and (c) to the state courts at all appellate stages. Because he cannot again seek state post-conviction relief, *see*

Or. Rev. Stat. 138.550 (3) (2005), these claims are procedurally defaulted. Zurcher has made no showing of cause and prejudice to excuse his procedural default, nor has he demonstrated that a fundamental miscarriage of justice will result if the Court does not consider his claim. Moreover, Zurcher's briefing to this Court focuses solely on claim (a). For these reasons, habeas relief as to claims (b) and (c) should be denied.

II. The Merits

A. Standard of Review

A habeas petitioner is not entitled to relief in federal court unless he demonstrates that the state court's adjudication of his claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or
>
> (2)resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The terms "contrary to" and "unreasonable application" have independent meanings. *Sarausad v. Porter*, 479 F.3d 671, 676 (9th Cir. 2007). A state court decision is "contrary to" clearly established federal law if it is "in conflict with", "opposite to" or "diametrically different from" Supreme Court precedent. *Williams, v. Taylor*, 529 U.S. 362, 388 (2000). An "unreasonable application" of clearly established Supreme Court law occurs when

"the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the . . . case." *Lambert v. Blodgett*, 393 F.3d 943, 974 (9th Cir. 2004) *cert. denied*, 126 S. Ct. 484 (2005)(citing *Williams,* 529 U.S. at 413). "A federal court making an 'unreasonable application' inquiry should ask whether the state court's application of federal law was objectively unreasonable." *Saurasad*, 479 F.3d at 676-77 (citing *Williams*, 529 U.S. at 409). Thus, federal courts apply a "highly deferential standard for evaluating state-court rulings." *Id.* at 676 (internal citations omitted).

"'Clearly established Federal law' is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lambert*, 393 F.3d at 974. The last reasoned decision by the state court is the basis for review by the federal court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Franklin v. Johnson*, 290 F.3d 1223, 1233 n. 3 (9th Cir. 2002). The decision of the state PCR trial court is the basis for review in the instant proceeding.

B. Ineffective Assistance of Counsel

A federal claim of ineffective assistance of counsel requires that the petitioner prove his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. *Bell v. Cone*, 535 U.S. 685, 695 (2002); *Williams*, 529 U.S. at 390-91; *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The Court evaluates counsel's performance based on the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland*, 466 U.S. at 689. ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight."). A petitioner's failure to prove either the performance prong or the prejudice prong will cause the claim to fail. *Strickland*, 466 U.S. at 697.

C. Analysis

Zurcher asserts the PCR court decision denying his claim was an unreasonable application of *Strickland*, making habeas relief available. Zurcher contends trial counsel was ineffective for failing to raise an *Apprendi*-based objection to the upward departure sentence he received on his guilty plea to Attempted Aggravated Murder. This Court finds Zurcher's arguments to be without merit.

Approximately six weeks before Zurcher's sentencing, *Apprendi* announced the following rule:

> "[o]ther than the fact of a prior conviction, any fact that increase[s] the penalty for a crime beyond the prescribed *statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt."

530 U.S. at 490 (emphasis added). Four years later, in *Blakely v. Washington*, 542 U.S. 296 (2004), the Supreme Court defined

"statutory maximum" as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant[,]" and "not the maximum sentence a judge may impose after finding additional facts . . . ." 542 U.S. at 303-304 (2004).

Under Oregon law, Zurcher's 240-month upward departure sentence was the statutory maximum for Attempted Aggravated Murder, a class A felony. Or. Rev. Stat. §§ 161.605; 161.405(2)(a) (1999). In addressing Zurcher's claim, the PCR court stated:

> [M]y position has been in the past -- and it will continue to be until told differently -- that while *Apprendi* was existent, there was no definition from which we could utilize *Apprendi* that would make application to cases of this nature.
>
> *Blakely* came down after this case. I don't find it an incumbent responsibility upon an attorney to anticipate what our Supreme brethren might do insofar as case law is concerned. There's a substantial change in case law, and I find no inadequacy of counsel -- appellate or trial level -- to have failed to bring up those issues at the time of sentencing or during the course of trial.

(#14 Ex. 122, 8.) The court also noted having read the pleadings and documentation. *Id.* at 9.

1. Sufficiency of the PCR Court's Review

Zurcher contends the PCR court did not conduct the requisite case by case analysis under *Strickland*, (#20, 17-18), and that its determination was, thus, contrary to and an unreasonable application of *Strickland*. (#27, 10-11.) Zurcher also contends

that because the PCR court did not make findings of fact with respect to counsel's failure to raise an *Apprendi*-based objection, its decision does not warrant deference.

I find Zurcher's contention that the PCR court did not consider the facts and circumstances of his case to be speculative given that the PCR court clearly stated "I've been through the documentation, read both parties' pleadings, and am prepared to proceed at this time insofar as a ruling is concerned." (#14 Ex. 122, 9.) Under § 2254, state courts are presumed to know and follow the law, and their decisions are given the benefit of the doubt. *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002.) Furthermore, "state courts are not required to address every jot and tittle of proof suggested to them, nor need they 'make detailed findings addressing all the evidence before [them].'" *Taylor*, 366 F.3d 992, 1001 (9th Cir. 2004) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003)).

2. Failure to Raise *Apprendi* Objection

Zurcher argues counsel should have objected that *Apprendi* precluded his sentence enhancement since he had not admitted the necessary facts for the departure. Zurcher further asserts that his attorney's error prejudiced his case because the attorney failed to preserve the issue for appellate review, which would have led to a remand for resentencing.

A court reviewing an ineffective assistance of counsel claim

cannot require that an attorney anticipate a decision in a later case. *Lowry*, 21 F.3d 344; *see also Sophanthavong v. Palmateer*, 378 F.3d 859, 870 (9th Cir. 2004)(holding attorney provided effective assistance in advising client regarding guilty plea; attorney was not required to accurately predict how courts would resolve question regarding sufficiency of evidence for conviction); *Murtishaw v. Woodford*, 255 F.3d 926, 949 (9th Cir. 2001) (holding an attorney can reasonably overlook a potential defense "owing to its uncertain and undeveloped character"). Other circuits, however, have held that counsel's failure to raise an issue whose resolution was "clearly foreshadowed by existing decisions" constituted ineffective assistance. *See, e.g., Lucas v. O'Dea*, 179 F.3d 412, 420 (6th Cir. 1999).

Here, Zurcher contends language in *Apprendi* made it "reasonably clear" that Oregon's sentencing scheme was unconstitutional. He argues that because counsel had a "clean slate" from which to raise an *Apprendi*-based objection and there was nothing to lose by doing so, the failure to raise the objection demonstrates "counsel performed below the standard of reasonable competence in the community." In support of this argument, Zurcher cites two cases in which *Apprendi*-based objections were filed.[1] *Id.* at 9.

[1] *State v. Dilts*, 179 Or. App. 238 (2002) challenged an upward departure sentence based on the court finding the defendant's actions were racially motivated. *State v. Ice*, 343 Or. 248 (2007),

Although no Oregon court had yet construed *Apprendi* at the time that Zurcher was sentenced, this Court cannot conclude that Zurcher's counsel was ineffective for failing to raise an *Apprendi* objection. Zurcher acknowledges his sentencing argument "did not follow inevitably from the majority opinion in *Apprendi*, . . . [and that] [t]he argument involved one of two plausible interpretations of the decision." (#27, 4.) *Apprendi* discussed judicial discretion in sentencing rather extensively and stated the limits of judicial discretion were defined by the statutory limits prescribed by the legislature.[2] As a result, until *Blakely*, Oregon courts understood statutory maximums to be the maximum terms of imprisonment set forth in state statutes. *See State v. Dilts*, 39 P.3d 276 (Or. App. 2002), *aff'd* 82 P.3d 593 (Or. 2003), *vacated by Dilts v. Oregon*, 542 U.S. 934 (2004).

This Court must apply *Strickland*'s charge to guard against the distorting effects of hindsight. Counsel cannot be faulted

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cert. granted, 128 S. Ct. 1657 (2008), challenged consecutive sentences imposed after the court found the defendant's actions "caused or created a risk of causing greater, qualitatively different loss, injury or harm to the victim."

[2] "We have often noted that judges in this country have long exercised discretion . . . in imposing sentence *within statutory limits* in the individual case. . . . [T]he consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Apprendi*, 530 U.S. at 481-483 (footnotes and citations omitted).

for not anticipating that "statutory maximum" would be interpreted as it was four years later in *Blakely*. *See Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994). Therefore, under the circumstances of this case, the PCR court reasonably concluded that the failure of Zurcher's counsel to raise an *Apprendi* objection at sentencing did not constitute ineffective assistance.

Under *Strickland*, failure to prove either the performance prong or the prejudice prong causes a claim to fail. The PCR court found counsel was not deficient, and, accordingly, it was neither contrary to nor an unreasonable application of *Strickland* for that court to deny Zurcher relief on his claim of ineffective assistance of counsel.

CONCLUSION

For the reasons stated above, the Amended Petition for Writ of Habeas Corpus (#16) should be DENIED, and judgment should enter DISMISSING this case with prejudice.

SCHEDULING ORDER

Objections to these Findings and Recommendation, if any, are due July 16,2008. If no objections are filed, then the Findings and Recommendation will be referred to a Unites States District Judge for review and go under advisement on that date. If objections are filed, any response to the objections will be due fourteen days after the date the objections are filed and review

of the Findings and Recommendation will go under advisement on that date.

NOTICE

A party's failure to timely file objections to any of these findings will be considered a waiver of that party's right to *de novo* consideration of the factual issues addressed herein and will constitute a waiver of the party's right to review of the findings of fact in any order or judgment entered by a district judge. These Findings and Recommendations are not immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be filed until entry of judgment.

DATED this 1st day of July, 2008.

/s/ Paul Papak
Paul Papak
United States Magistrate Judge